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In the Supreme Court of the United States.

OCTOBER TERM, 1905.

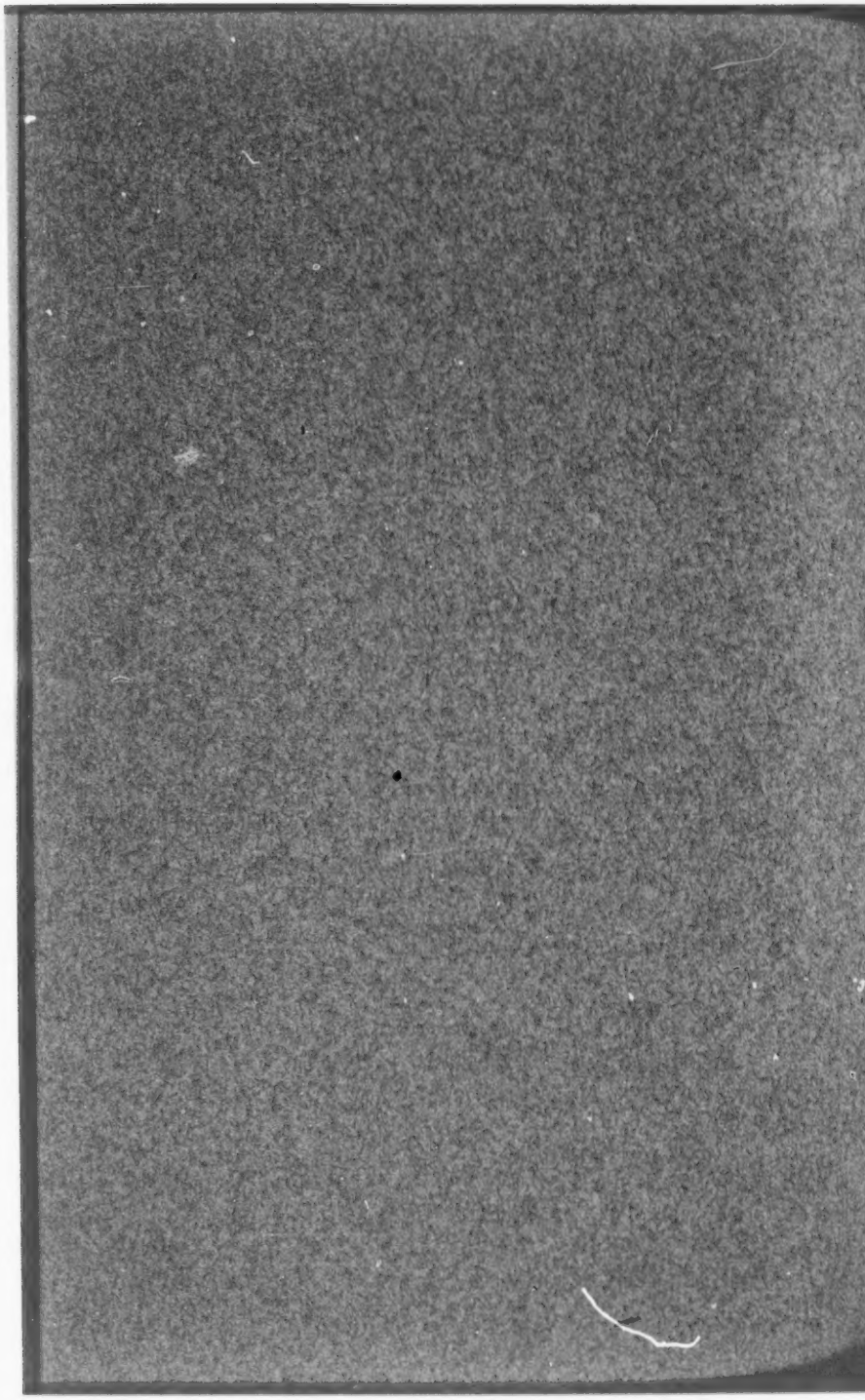
REUBEN HODGES, WILLIAM R. CLAMPIT, and Wash McKinney, plaintiffs in error,

v.

THE UNITED STATES.

No. 14.

BRIEF FOR THE UNITED STATES.



In the Supreme Court of the United States.

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STATEMENT OF CASE.

This is a writ of error from this court to the District Court of the United States for the Eastern District of Arkansas.

Appellants, with twelve others, were indicted at the October term, 1903, of said district court, under section 5508 of the Revised Statutes of the United States, which makes it an offense for two or more persons to conspire to injure or oppress, threaten or intimidate any citizen of the United States in the free exercise or enjoyment of any right or privilege guaranteed to him by the Constitution and laws of the United States, or because of his having so exercised the same. (Rec., 3.)

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The indictment, in substance, charges that the fifteen defendants therein named, pursuant to a conspiracy for the purpose, caused certain citizens of the United States of African descent, *because of their color*, to abandon certain contracts of employment they had entered into, by threatening and intimidating them with deadly weapons. (Rec., pp. 3–5.)

The defendants demurred (Rec. 5), demurrer was overruled (Rec. 7), and, after pleas of not guilty (Rec. 18), twelve defendants were found not guilty, and the three appellants guilty (Rec. 19), whereupon they sued out this writ of error (Rec. 20).

Upon the record the only questions raised are those contained in the causes of demurrer, as follows (Rec. 6):

First. That the allegations, matters, and things set out and charged in said bill of indictment do not constitute a public offense against the laws of the United States.

Second. Said bill of indictment is founded and based upon section 1977 of the Revised Statutes of the United States, being a portion of an act of the Congress of the United States, approved on May 31, 1870, and said section is unconstitutional and void because no warrant or authority is conferred by the Constitution of the United States upon the Congress thereof to enact the same.

Third. Said section, when taken and construed together with section 5508 of the Revised Statutes of the United States in so far as it creates offenses and imposes penalties, is in violation of the Constitution of

the United States and an infringement on the rights of the several States and the people thereof.

Fourth. Because the offense created by sections 1977 and 5508 of the Revised Statutes of the United States, under and upon which the indictment herein is based, are not constitutionally within the jurisdiction of the courts of the United States, and because the matters and things therein referred to are judicially cognizable by State tribunals only, and legislative action thereon is among the rights reserved to the several States and inhibited to Congress by the Constitution.

THE STATUTES RELATING TO CIVIL RIGHTS.

SEC. 5508. If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same; or if two or more persons go in disguise on the highway, or on the premises of another, with intent to prevent or hinder his free exercise or enjoyment of any right or privilege so secured, they shall be fined not more than five thousand dollars and imprisoned not more than ten years, and shall, moreover, be thereafter ineligible to any office, or place of honor, profit, or trust created by the Constitution or laws of the United States.

SEC. 1977. All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence,

and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

SEC. 1978. All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

SEC. 1979. Every person who, under color of any statute, ordinance, regulation, custom, or usage of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

SEC. 5510. Every person who, under color of any law, statute, ordinance, regulation, or custom, subjects, or causes to be subjected, any inhabitant of any State or Territory to the deprivation of any rights, privileges, or immunities, secured or protected by the Constitution and laws of the United States, or to different punishments, pains, or penalties, on account of such inhabitant being an alien, or by reason of his color or race, than are prescribed for the punishment of citizens, shall be punished by a fine of not more than one thousand dollars, or by imprisonment not more than one year, or by both.

THE QUESTION OF LAW.

Has a colored citizen of the United States of African descent a right secured to him by the Constitution or laws of the United States to work at any particular occupation or calling—as, for example, in the capacity of a common laborer in the manufacture of lumber—and therefore free from injury, oppression, or interference on the part of individual citizens, when the motive for such injury, oppression, or interference arises solely from the fact that such laborer is a colored person of African descent?

THE GOVERNMENT'S POSITION.

It will be observed that this question of law does not involve the constitutionality of section 5508 of the Revised Statutes (which is not open to doubt, *Motes* v. *United States*, 178 U. S., 458), but simply the question whether the phrase "any right or privilege secured to him by the Constitution or laws of the United States," includes the right charged in this indictment as having been secured to the colored citizens who were driven away from work by the unlawful acts of individuals.

In the case of *United States* v. *Cruikshank et al.* 92 U. S., 545, this court held that the general rule is that sovereignty for the protection of the inalienable rights of life and personal liberty rests alone with the States and that "it is no more the duty or within the power of the United States to punish for a conspiracy to falsely imprison or a murder within a State than it would be to punish for false imprisonment or murder itself."

In the case of *Logan* v. *The United States* 144 U. S., 263, 293, Mr. Justice Gray, delivering the opinion of the court, said:

> The whole scope and effect of this series of decisions is that, while certain fundamental rights, recognized and declared, but not granted or created, in some of the amendments to the Constitution, are thereby guaranteed only against violation or abridgment by the United States, or by the States, as the case may be, and can not therefore be affirmatively enforced by Congress against unlawful acts of individuals; yet that every right created by, arising under, or dependent upon the Constitution of the United States, may be protected and enforced by Congress by such means and in such manner as Congress, in the exercise of the correlative duty of protection, or of the legislative powers conferred upon it by the Constitution, may in its discretion deem most eligible and best adapted to attain the object.

With these decisions, and many others that might be cited, before us, it is vain to contend that the Federal Constitution secures to a citizen of the United States the right to work at a given occupation or particular calling free from injury, oppression, or interference by individual citizens.

Even though such right be a natural or inalienable right, the duty of protecting the citizen in the enjoyment of such right, free from individual interference, rests alone with the State.

Unless, therefore, the additional element, to wit, the infliction of an injury upon one individual citizen by another, solely on account of his color, be sufficient ground to redress such injury the individual citizen suffering such injury must be left for redress of his grievance to the State laws.

In the *Cruikshank case* (*supra*) this question was left open. *United States* v. *Cruikshank*, 92 U. S., 542, 555.

The Congress of the United States has attempted to secure such a right by section 1977, above set forth, and the question at once arises as to the authority of Congress to enact such legislation.

Consideration of the various constitutional provisions under which the right to enact section 1977 might be claimed.

Bearing in mind that the indictment does not allege that the appellants acted under color of any State authority; that the case presented is one of the concerted action of individuals, acting solely on their own responsibility, we approach the consideration of the Constitution.

In what may be called the old Constitution—the Constitution as it stood before the war amendments—there were no provisions which could be invoked to support section 1977.

Article IV, section 2, provided:

> The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.

If this section were not inapplicable on other

grounds, it could not be invoked here, for it is prohibitive only of State action.

Paul v. *Virginia*, 8 Wall., 168.
Ward v. *Maryland*, 12 Wall., 418.
Slaughter-House cases, 16 Wall., 36.
United States v. *Harris*, 106 U. S., 629, 643.
Blake v. *McClung*, 172 U. S., 236.

And for a similar reason the power can not be sought in the fourteenth amendment.

United States v. *Reese*, 92 U. S., 214.
United States v. *Cruikshank*, 92 U. S., 542.
Virginia v. *Rives*, 100 U. S., 313.
Ex parte Virginia, 100 U. S., 339.
Civil Rights cases, 109 U. S., 3.
United States v. *Harris*, 106 U. S., 629.
James v. *Bowman*, 190 U. S., 127.

This court has recently decided that, under the Thirteenth Amendment, Congress may enact laws operating primarily upon individuals (*United States* v. *Clyatt*, 197 U. S., 207), and if section 1977 can not be sustained under that amendment the Government's case must fail.

The Thirteenth Amendment provides as follows:

> SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime wherof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> SEC. 2. Congress shall have power to enforce this article by appropriate legislation.

(Proposed by Congress February 1, 1865, and declared in force December 18, 1865.)

THE THIRTEENTH AMENDMENT WAS INTENDED TO SECURE TO THE COLORED RACE PRACTICAL FREEDOM.

As is well known, this was the first of the war amendments. Prior thereto the status of the individual was within the exclusive control of the States, with, perhaps, the single exception that no State could grant a title of nobility. Each State determined for itself whether slavery should exist within its borders and by what rules it should be governed. The war amendments worked a considerable change; there was a reassignment of power, and by them a certain part of the authority previously exercised by the States was by the people withdrawn and conferred upon the nation.

At the time the thirteenth amendment was adopted the condition of the colored race was well known. In the *Dred Scott* case, which attracted widespread attention, it was said that the negro had no rights which a white man was bound to respect. His status was graphically and accurately described by Mr. Howard in a speech made in the Senate when the act of April 9, 1866, the parent of section 1977, was under consideration. He said:

> What is a slave in contemplation of American law, in contemplation of the laws of all the slave States? We know full well; the history of two hundred years teaches us that he had no rights, nor nothing which he could call his own. He had not the right to become a husband or a father in the eye of the law, he had no child, he was not at liberty to indulge the natural affections of the human heart for children, for wife,

> or even for friend. He owned no property, because the law prohibited him. He could not take real or personal estate, either by sale, by grant, or by descent or inheritance. He did not own the bread he earned and ate. He stood upon the face of the earth completely isolated from the society in which he happened to be; he was nothing but a chattel, subject to the will of his owner, and unprotected in his rights by the law of the State where he happened to live. His rights, did I say? No, sir; I use inappropriate language. He had no rights. He was an animal; he was property, a chattel. The Almighty, according to the ideas of the times, had made him to be property, a chattel, and not a man. (Cong. Globe, vol. 69, p. 504.)

With these distinct ideas of the status of the colored race, with the knowledge that 200,000 of them had enlisted in the armies of freedom to aid in suppressing the rebellion in the insurrectionary States, the Thirteenth Amendment was added to the Constitution by the people.

The official declaration of the adoption of the Thirteenth Amendment was made December 18, 1865, and on January 5, 1866, Mr. Trumbull, chairman of the Senate Judiciary Committee, who had been chiefly instrumental in securing the proposal of the Thirteenth Amendment by Congress, introduced Senate bill No. 61, which became the act of April 9, 1866, Chapter XXXI.

When passed, the act, entitled "An act to protect all persons in the United States in their civil rights,

and furnish the means of their vindication," provided in its first section:

> That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding.

From the date of the act it appears that it was enacted under the Thirteenth Amendment, for the Fourteenth Amendment was not proposed by Congress until June 16, 1866. And in the debates, indeed, the earlier amendment was solely invoked as a justification for its passage.

In introducing the bill Mr. Trumbull said that the Thirteenth Amendment declared all persons to be free, and that the purpose of the bill was to secure to all persons within the United States practical freedom. He called attention to laws passed by the legislatures which

had assembled in the insurrectionary States, discriminating against the freedmen, and putting upon them the very same restrictions imposed upon them in consequence of the existence of slavery before it was abolished. (Cong. Globe, No. 69, p. 474.)

Proceeding to consider the power of Congress to pass the bill, he said (Ib., p. 475):

> Then, under the constitutional amendment which we have now adopted, and which declares that slavery shall no longer exist, and which authorizes Congress by appropriate legislation to carry this provision into effect, I hold that we have a right to pass any law which, in our judgment, is deemed appropriate, and which will accomplish the end in view, secure freedom to all people in the United States. The various State laws to which I have referred—and there are many others—although they do not make a man an absolute slave, yet deprive him of the rights of a free man; and it is perhaps difficult to draw the precise line, to say where freedom ceases and slavery begins, but a law that does not allow a colored person to go from one county to another is certainly a law in derogation of the rights of a freeman. A law that does not allow a colored person to hold property, does not allow him to teach, does not allow him to preach, is certainly a law in violation of the rights of a freeman, and being so may properly be declared void.

The bill was supported, also, by Mr. Howard, a member of the Senate Judiciary Committee. He said (Ib., p. 503):

I happened to be a member of the Judiciary Committee at the time this amendment was drafted and adopted and reported to the Senate. I recollect very distinctly what were the views entertained by members of that committee at the time it was under consideration by them. And notwithstanding the very vehement style of the Senator from Pennsylvania (Mr. Cowan, who opposed the bill) in placing a narrow and utterly ineffectual construction upon it, I take this occasion to say that it was in contemplation of its friends and advocates to give to Congress precisely the power over the subject of slavery and the freedmen which is proposed to be exercised by the bill now under our consideration.

It was easy to foresee, and of course we foresaw, that in case this scheme of emancipation was carried out in the rebel States it would encounter the most vehement resistance on the part of the old slaveholders. It was easy to look far enough into the future to perceive that it would be an unwelcome measure to them, and that they would resort to every means in their power to prevent what they called the loss of their property under this amendment. We could foresee easily enough that they would use, if they should be permitted to do so by the General Government, all the powers of the State governments in restraining and circumscribing the rights and privileges which are plainly given by it to the emancipated negro.

The bill was opposed on constitutional and other grounds, passed the Senate and House by overwhelm-

ing majorities, was vetoed by President Johnson, passed over his veto, and became the act of April 9, 1866, chapter XXXI, 14 Stats., 27.

From the foregoing extracts from the speeches of members of Congress—and they could be multiplied to great length—and from the more than two-thirds vote which the act of 1866 received in both Houses of Congress, coupled with the fact that many who voted for the bill were members of the Congress which proposed the Thirteenth Amendment, and doubtless explained its terms to their constituents, who adopted it, we have a contemporaneous construction of the meaning of that amendment entitled to the greatest weight. *McCulloch* v. *Maryland*, 4 Wheat, 401.

It is proposed next to examine the cases wherein the Thirteenth Amendment has been considered.

Slaughter-house cases (16 Wall., 36): In these cases the court was concerned with certain questions growing out of the grant by the legislature of Louisiana to a slaughter-house company of exclusive privileges. It was claimed by counsel that the legislation was void under the Thirteenth Amendment, because that amendment forbade certain servitudes which had attached to *property* in feudal Europe.

This court said, after quoting the amendment (p. 69):

> To withdraw the mind from the contemplation of this grand yet simple declaration of the personal freedom of all the human race within the jurisdiction of this Government—a declaration designed to establish the freedom of four millions of slaves—and with a microscopic

> search endeavor to find in it a reference to servitudes, which may have been attached to *property* in certain localities, requires an effort, to say the least of it.

To confirm and illustrate the view that property servitudes were not contemplated, the opinion proceeds:

> That a personal servitude was meant is proved by the use of the word "involuntary," which can only apply to human beings.

This was all that was required to refute the position which the court assumed that counsel took.

In this case the Chief Justice, Mr. Justice Swayne, Mr. Justice Bradley, and Mr. Justice Field dissented.

Mr. Justice Field rested his objections to the validity of the legislation upon the Fourteenth Amendment. However, he made some observations upon the scope of the Thirteenth Amendment which, although not authoritative, are entitled to respect.

He said (p. 90):

> The words "involuntary servitude" have not been the subject of any judicial or legislative exposition that I am aware of in this country, except that which is found in the Civil Rights Act, which will be hereafter noticed. It is, however, clear that they include something more than slavery in the strict sense of the term; they include also serfage, vassalage, villenage, peonage, and all other forms of compulsory service for the mere benefit or pleasure of others. Nor is this the full import of the terms. The abolition of slavery and involuntary servitude was intended to make every one

born in this country a freeman, and as such to give to him the right to pursue the ordinary avocations of life without other restraint than such as affects all others, and to enjoy equally with them the fruits of his labor. A prohibition to him to pursue certain callings open to others of the same age, condition, and sex, or to reside in places where others are permitted to live, would so far deprive him of the rights of a freeman, and would place him, as respects others, in a condition of servitude. A person allowed to pursue only one trade or calling, and only in one locality of the country, would not be, in the strict sense of the term, in a condition of slavery, but probably none would deny that he would be in a condition of servitude. He certainly would not possess the liberties nor enjoy the privileges of a freeman. The compulsion which would force him to labor even for his own benefit only in one direction, or in one place, would be almost as oppressive and nearly as great an invasion of his liberty as the compulsion which would force him to labor for the benefit or pleasure of another, and would equally constitute an element of servitude.

United States v. *Harris* (106 U. S., 629).

In this case this court declared section 5519 of the Revised Statutes of the United States unconstitutional. Section 5519 provided as follows:

> SEC. 5519. If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the

> equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws, each of such persons shall be punished by a fine of not less than five hundred nor more than five thousand dollars, or by imprisonment with or without hard labor not less than six months nor more than six years, or by both such fine and imprisonment.

In considering whether this section could be supported under the Thirteenth Amendment, it was said (p. 641):

> Even if the amendment is held to be directed against the action of private individuals, as well as against the action of the States and United States, the law under consideration covers cases both within and without the provisions of the amendment. It covers any conspiracy between two free white men against another free white man to deprive him of any right accorded him by the laws of the State or of the United States. A law under which two or more free white private citizens could be punished for conspiring or going in disguise for the purpose of depriving another free white citizen of a right accorded by the law of the State to all classes of persons—as, for instance, the right to make a contract, bring a suit, or give evidence—clearly can not be authorized by the amendment which simply prohibits slavery and involuntary servitude.

This language is seized upon by the appellants as conclusively showing that a law which carefully limits the jurisdiction of the nation to offenses against persons *on account of their color* is unconstitutional. Obviously, all that the court meant to say was that section 5519, because not so limited in its operation, was broader than the Thirteenth Amendment contemplated.

In confirmation of this explanation the following extract from a prior part of the opinion is illuminating (p. 640):

> We are next to consider whether the Thirteenth Amendment to the Constitution furnishes authority for the enactment of the section. This amendment declares that "neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States or any place subject to their jurisdiction." "Congress shall have power to enforce this article by appropriate legislation."
>
> It is clear that this amendment, besides abolishing forever slavery and involuntary servitude within the United States, gives power to Congress to protect all persons within the jurisdiction of the United States from being in any way subjected to slavery or involuntary servitude, except as a punishment for crime, and in the enjoyment of that freedom which it was the object of the amendment to secure. Mr. Justice Swayne, in *United States* v. *Rhodes*, 1 Abb. (U. S.), 28; Mr. Justice Bradley, in *United States* v. *Cruikshank*, 1 Woods, 308.

> Congress has, by virtue of this amendment, declared, in section 1 of the act of April 9, 1866, chapter 31, that all persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to none other.
>
> But the question with which we have to deal is, Does the Thirteenth Amendment warrant the enactment of section 5519 of the Revised Statutes? We are of opinion that it does not. Our conclusion is based on the fact that the provisions of that section are broader than the Thirteenth Amendment would justify. Under that section it would be an offense for two or more white persons to conspire, etc., for the purpose of depriving another white person of the equal protection of the laws. It would be an offense for two or more colored persons, enfranchised slaves, to conspire with the same purpose against a white citizen or against another colored citizen who had never been a slave.

This language plainly shows that the court did not doubt the validity of the act of April 9, 1866, and the two cases, cited with express approval, both uphold the constitutionality of the act of April 9, 1866.

United States v. *Rhoades*, 1 Abb. (U. S.), 28.
United States v. *Cruikshank*, 1 Woods, 308, 319.

The last sentence in the foregoing extract does not impair the argument that the Thirteenth Amendment was intended to secure practical freedom, but is an apt illustration in aid of the argument, for it shows that the court had in mind the distinction between interference with a man's rights because of his color, and interference for ordinary motives of private gain.

Civil rights cases 109 U. S., 3: These cases arose from the enactment of the Civil Rights Act of 1875, which provided that the negro, equally with the white man, should have accommodation in public places of amusement, hotels, and public conveyances.

In attempting to find authority in the Thirteenth Amendment to support the act of 1875, the theory was advanced that that amendment gave Congress power to abolish all badges of slavery, and that it was a badge of slavery to be denied the rights secured by the act on account of color. The court, however, did not find it necessary to consider this question, because it held that the denial of the *social* rights attempted to be secured by the act of 1875, as distinguished from the *fundamental* rights secured by the act of 1866, did not amount to the imposition of a badge of slavery.

In speaking of the act of April 9, 1866, it was said (p. 22):

> The long existence of African slavery in this country gave us very distinct notions of what it was, and what were its necessary incidents. Compulsory service of the slave for the benefit of the master, restraint of his movements except by the master's will, disability to hold property,

to make contracts, to have a standing in court, to be a witness against a white person, and such like burdens and incapacities, were the inseparable incidents of the institution. Severer punishments for crimes were imposed on the slave than on free persons guilty of the same offenses. Congress, as we have seen, by the Civil Rights bill of 1866, passed in view of the Thirteenth Amendment, before the Fourteenth was adopted, undertook to wipe out these burdens and disabilities, the necessary incidents of slavery, constituting its substance and visible form; and to secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens. Whether this legislation was fully authorized by the Thirteenth Amendment alone, without the support which it afterwards received from the Fourteenth Amendment, after the adoption of which it was reenacted with some additions, it is not necessary to inquire. It is referred to for the purpose of showing that at that time (in 1866) Congress did not assume, under the authority given by the Thirteenth Amendment, to adjust what may be called the social rights of men and races in the community; but only to declare and vindicate those fundamental rights which appertain to the essence of citizenship, and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery.

In this case Mr. Justice Harlan dissented, taking the view that Congress, under the Thirteenth Amendment, had power to legislate to protect freemen from the imposition of badges of slavery, and that the act of 1875 was appropriate to the end. He considered that the validity of the act of 1866 was involved, and held it to be constitutional. He said (p. 35):

> That there are burdens and disabilities which constitute badges of slavery and servitude, and that the power to enforce by appropriate legislation the Thirteenth Amendment may be exerted by legislation of a direct and primary character for the eradication not simply of the institution, but of its badges and incidents, are propositions which ought to be deemed indisputable. They lie at the foundation of the Civil Rights act of 1866. Whether that act was authorized by the Thirteenth Amendment alone, without the support which it subsequently received from the Fourteenth Amendment, after the adoption of which it was reenacted with some additions, my brethren do not consider it necessary to inquire. But I submit, with all respect to them, that its constitutionality is conclusively shown by their opinion. They admit, as I have said, that the Thirteenth Amendment established freedom; that there are burdens and disabilities, the necessary incidents of slavery, which constitute its substance and visible form; that Congress, by the act of 1866, passed in view of the Thirteenth Amendment, before the Fourteenth was adopted, undertook to remove certain burdens and disabilities, the necessary incidents of slavery, and to secure to all citizens of every race and color,

and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell, and convey property as is enjoyed by white citizens; that under the Thirteenth Amendment Congress has to do with slavery and its incidents; and that legislation, so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, may be direct and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not. These propositions being conceded, it is impossible, as it seems to me, to question the constitutional validity of the Civil-Rights act of 1866. I do not contend that the Thirteenth Amendment invests Congress with authority, by legislation, to define and regulate the entire body of the civil rights which citizens enjoy, or may enjoy, in the several States. But I hold that since slavery, as the court has repeatedly declared (*Slaughterhouse cases*, 16 Wall., 36; *Strauder* v. *West Virginia*, 100 U. S., 303), was the moving or principal cause of the adoption of that amendment, and since that institution rested wholly upon the inferiority, as a race, of those held in bondage, their freedom necessarily involved immunity from and protection against all discrimination against them, because of their race, in respect of such civil rights as belong to freemen of other races. Congress, therefore, under its express power to enforce that amendment, by appropriate legislation, may enact laws to protect that people against the depriva-

> tion, *because of their race*, of any civil rights granted to other freemen in the same State, and such legislation may be of a direct and primary character, operating upon States, their officers and agents, and also upon at least such individuals and corporations as exercise public functions and wield power and authority under the State.
>
> *Clyatt* v. *United States*, 197 U. S. 207.

In this case, after conceding that as a general proposition the ordinary relations of individual to individual are subject to the control of the States and not intrusted to the nation, this court held that the Thirteenth Amendment, unlike the Fourteenth and Fifteenth, gives Congress power to enact legislation, direct and primary in character, operating upon the acts of individuals, whether sanctioned by State authority or not.

The Thirteenth Amendment has been considered in some other cases in this court, but an examination of them is not material to the discussion of this case.

> *Plessy* v. *Ferguson*, 163 U. S., 537.
> *Robertson* v. *Baldwin*, 165 U. S., 275.

From the foregoing discussion it appears that this court has never held that the Thirteenth Amendment was not broad enough to permit of legislation such as is contained in section 1977. We have seen, on the contrary, that Mr. Justice Field and Mr. Justice Harlan have given the support of their opinions to the validity of the parent enactment.

> *Slaughter-house cases*, 16 Wall., 36, 90, 91.
> *Civil Rights cases*, 109 U. S., 3, 35.

The validity of the act of April 9, 1866, was sustained in several cases in the lower courts of the United States, and in the State courts.

In *United States* v. *Rhodes*, 1 Abb. (U. S.) 28, Mr. Justice Swayne considered the act very fully and upheld its constitutionality in all its parts.

See, also, *Matter of Elizabeth Turner*, 1 (Abb. (U. S.) 84), decided by Mr. Chief Justice Chase.

Smith v. *Moody*, 26 Ind., 299, 306, 307.

People v. *Washington*, 36 Cal., 658.

United States v. *Cruikshank*, 1 Woods, 308, 319, opinion by Mr. Justice Bradley.

In *United States* v. *Rhodes*, Mr. Justice Swayne said (p. 55):

> Throughout the war the African race had evinced entire sympathy with the Union cause. At the close of the rebellion two hundred thousand had become soldiers in the Union armies. The race had strong claims upon the justice and generosity of the nation. Weighty considerations of policy, humanity, and right were superadded. Slavery, in fact, still subsisted in thirteen States. Its simple abolition, leaving these laws and this exclusive power of the States over the emancipated in force, would have been a phantom of delusion. The hostility of the dominant class would have been animated with new ardor. Legislative oppression would have been increased in severity. Under the guise of police and other regulations slavery would have been in effect restored, perhaps in a worse form, and the gift of freedom would have been a curse instead of a blessing

> to those intended to be benefited. They would have had no longer the protection which the instinct of property leads its possessor to give in whatever form the property may exist. It was to guard against such evils that the second section of the amendment was framed. It was intended to give expressly to Congress the requisite authority, and to leave no room for doubt or cavil upon the subject. The results have shown the wisdom of this forecast. Almost simultaneously with the adoption of the amendment this course of legislative oppression was begun. Hence, doubtless, the passage of the act under consideration. In the presence of these facts, who will say it is not an "*appropriate*" means of carrying out the object of the first section of the amendment, and a necessary and proper execution of the power conferred by the second? Blot out this act and deny the constitutional power to pass it, and the worst effects of slavery might speedily follow. It would be a virtual abrogation of the amendment.

In *United States* v. *Cruikshank*, Mr. Justice Bradley said (p. 319):

> It can not be doubted, therefore, that Congress had the power to make it a penal offense to conspire to deprive a person of, or to hinder him in, the exercise and enjoyment of the rights and privileges conferred by the Thirteenth Amendment and the laws thus passed in pursuance thereof.
>
> But this power does not authorize Congress to pass laws for the punishment of ordinary crimes and offenses against persons of the

colored race or any other race. That belongs to the State government alone. All ordinary murders, robberies, assaults, thefts, and offenses whatsoever are cognizable only in the State courts, unless, indeed, the State should deny to the class of persons referred to the equal protection of the laws. Then, of course, Congress could provide remedies for their security and protection. But in ordinary cases where the laws of the State are not obnoxious to the provisions of the amendment, the duty of Congress in the creation and punishment of offenses is limited to those offenses which aim at the deprivation of the colored citizen's enjoyment and exercise of his rights of citizenship and of equal protection of the laws because of his race, color, or previous condition of servitude.

To illustrate: If, in a community or neighborhood composed principally of whites, a citizen of African descent, or of the Indian race, not within the exception of the amendment, should propose to lease and cultivate a farm, and a combination should be formed to expel him and prevent him from the accomplishment of his purpose on account of his race or color, it can not be doubted that this would be a case within the power of Congress to remedy and redress. It would be a case of interference with that person's exercise of his equal rights as a citizen because of his race. But if that person should be injured in his person or property by any wrongdoer for the mere felonious or wrongful purpose of malice, revenge, hatred, or gain, without any design to interfere with his rights of citizenship or equality before the laws, as

> being a person of a different race and color from the white race, it would be an ordinary crime, punishable by the state laws only.
>
> To constitute an offense, therefore, of which Congress and the courts of the United States have a right to take cognizance under this amendment, there must be a design to injure a person, or deprive him of his equal right of enjoying the protection of the laws, by reason of his race, color, or previous condition of servitude. Otherwise it is a case exclusively within the jurisdiction of the state and its courts.

The act of 1866 was held to be unconstitutional in a dissenting opinion in *People* v. *Washington* (*supra*), and in *Bowlin* v. *Commonwealth* (2 Bush, (Ky.) 5).

From the above authorities and extracts from speeches in Congress, the Gove ment contends that the people, having clear notions of the status of the colored race and of what attempts would be made to return it to its servile condition, intended by the Thirteenth Amendment to grant and secure practical freedom. It outrages our feelings of humanity to believe that the men who had fought to free the slaves merely intended to sever the legal ligament which bound the slave to his master, leaving the latter at liberty to cut him off from the fundamental rights which white men enjoyed. Such a narrow construction leaves the black race in a state made worse by their emancipation, by the breaking of the cord of self-interest which bound the slaveholder to take care of his property. That motive would disappear with the adoption of the amendment, and the people must have

foreseen that the former slaveholders would strive, by individual action and through the reconstructed legislatures in the late rebellious States, to prevent the freedmen from acquiring property, suing in the courts, giving evidence, and in a great variety of ways endeavor to prevent those whom they regarded as intended by the Almighty to be bondsmen from enjoying the practical rights of freemen.

For this purpose the people used in the amendment language which this court has said permits Congress to enact legislation operating directly to punish the acts of individuals, not sanctioned by any color of State authority. *Clyatt* v. *United States*, 197 U. S., 207.

The framers of that amendment were familiar with the provisions of the Constitution, and with that which gave Congress power "To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the Government of the United States, or in any Department or officer thereof."

Those who framed the second section, as said by Mr. Justice Harlan in the civil rights cases (p. 34)—

> were not ignorant of the discussions covering many years of our country's history, as to the constitutional power of Congress to enact the fugitive slave laws of 1793 and 1850. When, therefore, it was determined, by a change in the fundamental law, to uproot the institution of slavery wherever it existed in the land, and to

> establish universal freedom, there was a fixed purpose to place the authority of Congress in the premises beyond the possibility of a doubt.

The cases upholding the constitutionality of the fugitive slave laws are important, and will now be considered because they give us the rule by which to determine what is appropriate legislation.

Prigg v. *Pennsylvania*, 16 Peters, 539.
Ableman v. *Booth*, 21 How., 506.

The Constitution provided, Article III, section 2:

> No person held to service or labor in one State under the laws thereof, escaping into another, shall in consequence of any law or regulation therein, be discharged from such service or labor, but shall be delivered up, on claim of the party to whom such service or labor may be due.

Under this provision Congress passed two fugitive slave laws—the law of 1793 and the law of 1850. Each of those acts was legislation not corrective of State action, but operating directly upon individuals; each provided for the infliction of a penalty upon any man who should aid a fugitive slave in his escape from his owner. These statutes were before this court in the above cases, and were held to be constitutional.

In the *Prigg case* (*supra*), Mr. Justice Story said (p. 618):

> But it has been argued that the act of Congress is unconstitutional, because it does not fall within the scope of any of the enumerated powers of legislation confided to that body;

and therefore it is void. Stripped of its artificial and technical structure, the argument comes to this, that although rights are exclusively secured by, or duties are exclusively imposed upon, the National Government, yet, unless the power to enforce these rights or to execute these duties can be found among the express powers of legislation enumerated in the Constitution, they remain without any means of giving them effect by any act of Congress; and they must operate solely *proprio vigore*, however defective may be their operation; nay, even although in a practical sense, they may become a nullity from the want of a proper remedy to enforce them or to provide against their violation. If this be the true interpretation of the Constitution, it must, in a great measure, fail to attain many of its avowed and positive objects, as a security of rights and a recognition of duties. Such a limited construction of the Constitution has never yet been adopted as correct, either in theory or practice. No one has ever supposed that Congress could, constitutionally, by its legislation, exercise powers or enact laws, beyond the powers delegated to it by the Constitution. But it has, on various occasions, exercised powers which were necessary and proper as means to carry into effect rights expressly given and duties expressly enjoined thereby. The end being required, it has been deemed a just and necessary implication that the means to accomplish it are given also; or, in other words, that the power flows as a necessary means to accomplish the end.

There was a dissent in this case, but it conflicted in no way with the views expressed above. See, also, *McCulloch* v. *Maryland*, 4 Wheat., 401.

If Congress had the implied power to enact laws for the security of the master's property in his slave, shall it be said that the express grant of power given by the Thirteenth Amendment does not confer the right to legislate for practical freedom?

The Constitution, in all its parts, is to be given a broad, liberal construction, in accord with the spirit of its framers. It is not to be narrowly interpreted, and the derivative meaning of words closely followed. The history of the times, its contemporaneous construction, all extrinsic as well as intrinsic evidence as to its meaning, are to be studied. None of its parts were conceived to be construed as a code of laws; it is to be viewed, on the contrary, as a charter of liberties.

Thus contemplated the Thirteenth Amendment, adopted for the avowed purpose of eradicating slavery of every kind and description, with all its incidents, interpreted by the men who proposed it as intended to secure to the negro practical freedom, protects him in the free enjoyment of the fundamental rights which inhere in freedom, the denial of which, as was said in the *Civil Rights cases*, 109 U. S., 3, 22, constituted the substance and visible form of slavery.

If these premises be admitted it follows that legislation, like section 1977, which declares that the black and white races shall be upon an equality in the enjoyment of these rights, is apt and appropriate.

Thus far it has been assumed that sections 1977 and 5508 were intended to protect the colored race from the acts of individuals, not done under color of State authority. It is now proposed to examine those sections more particularly, and to define their meaning.

The intent of Congress, expressed in sections 1977 and 5508, is to make it an offense for individuals, acting in combination, to injure or oppress the negro, solely because of his color, in his right to make and enforce contracts.

The act of April 9, 1866 (14 Stat., 27), was reenacted in the Enforcement Act of 1870. Act of May 31, 1870 (16 Stat., 140). In the latter act section 16 was, for all material purposes, like section 1 of the act of 1866 (which is set out hereinbefore at p. 11). Both sections in those acts, after the declaration that the negro should be upon an equality with the white man in the right to make and enforce contracts, sue, be a witness, purchase and inherit property, etc., contained these words: "Any law, statute, ordinance, regulation, or custom to the contrary notwithstanding." In 1866, and again in 1870, therefore, Congress did not attempt to protect the negro from the acts of individuals, unless they were done under the sanction, or supposed sanction, of some State law or custom.

That Congress had power to go further, and enact legislation acting primarily on individuals, admits of no doubt. *Clyatt* v. *United States*, 197 U. S., 207.

And in the revision of the statutes of the United States the Congress exercised that power to its fullest extent by omitting the words above quoted.

It is true that section 1979 qualifies section 1977, so far that a civil action for the deprivation of civil rights can not be maintained unless the wrong was done under color of some State or Territorial statute or usage, and that section 1977 is also qualified by section 5510, so that no individual acting alone can be prosecuted for the deprivation of civil rights unless he acted under color of State or Territorial authority. However, the case presented is that of a combination of individuals to deprive of rights, and, for that case, the expressed intention of Congress is to provide protection against the lawless acts of individuals. If Congress had not so intended it would have introduced into section 5508, after the word "persons," the words "under color of any law statute, ordinance, regulation, or custom," or words of similar import, as it did in sections 5510 and 1979.

That no other construction is permissible is conclusively shown by referring to section 5596, Revised Statutes of the United States, which provides, so far as material, as follows:

> SEC. 5596. All acts of Congress passed prior to said first day of December, one thousand eight hundred and seventy-three, any portion of which is embraced in any section of said revision, are hereby repealed, and the section applicable thereto shall be in force in lieu thereof; all parts of such acts having been repealed or superseded by subsequent acts, or not being general and permanent in their nature * * *.

As was said in *United States* v. *Bowen*, 100 U. S., 508, 513:

> The Revised Statutes must be treated as the legislative declaration of the statute law on the subjects which they embrace on the 1st day of December, 1873. When the meaning is plain the courts can not look to the statutes which have been revised to see if Congress erred in that revision, but may do so when necessary to construe doubtful language used in expressing the meaning of Congress.

There is no ambiguity in sections 1977 and 5508, and, therefore, reference can not be made to the acts of 1866 and 1870. As those sections stand in the Revised Statutes they plainly indicate an intention to make the concerted action of several for the purpose of depriving a negro of civil rights, because of his color, a national crime, when they act without color of State authority.

In conclusion, it is proposed to consider briefly some objections that have been urged, and which may be urged, against the views hereinbefore set forth.

CONSIDERATION OF OBJECTIONS TO GOVERNMENT'S POSITION.

Appellants state in their brief (p. 6):

> This case is resolved into a simple question: Is the right to contract one guaranteed or secured by the Constitution or laws of the United States?

If the foregoing discussion has been to any purpose it has been shown, on the contrary, that the

question in this case is whether the Constitution and laws of the United States have secured to the negro the right not to be interfered with, solely on account of his color, in the enjoyment of rights necessary to secure to him practical freedom.

Appellants refer to the cases which were reviewed in *Logan's case* (144 U. S., 263), where it was practically held that where the Constitution recognizes and declares rights as already existing before its adoption, Congress can not legislate to protect persons in the exercise of such inalienable rights from the acts of individuals unless they act under the sanction of State authority; that it rests wholly with the States to protect one individual from another in the enjoyment of inalienable rights. Proceeding with this argument, they call attention to the concurring opinion of Mr. Justice Field in *Butchers' Union* v. *Crescent City Co.* (111 U. S., 746, 757), where he said the right to pursue any lawful business or vocation is an inalienable right.

It needs but a moment's reflection to perceive that the colored race, in this country, never possessed this, or any other right, until it was granted and secured—not recognized and declared—by the Thirteenth Amendment, and the laws passed in pursuance thereof. If rights are granted and secured by constitutional enactments, Congress may legislate to protect those rights against individual action.

United States v. *Reese*, 92 U. S., 214.
Strauder v. *West Virginia*, 100 U. S., 303.
Ex parte Virginia, 100 U. S., 339.
Ex parte Yarbrough, 110 U. S., 651.

United States v. *Waddell*, 112 U. S., 76.
Baldwin v. *Franks*, 120 U. S., 678.
Logan v. *United States*, 144 U. S., 263.
Motes v. *United States*, 178 U. S., 458.

In *Clyatt* v. *United States* (197 U. S., 207), not cited by appellants, it was held that the Thirteenth Amendment, unlike the Fourteenth and Fifteenth, gives Congress authority to enact legislation operating upon individuals.

At page 9 of appellant's brief, this question is asked:

> Would it be held to fasten a badge of slavery upon a white man if his right to contract should be interfered with by intimidations or threats?

The Government does not so contend, for the reason that the power of the nation can not be invoked unless rights essential to the enjoyment of freedom have been infringed solely on account of color.

In the case of *Scott* v. *Sandford* (19 How., 393), it was decided that slaves were not citizens. The emancipation proclamation made them free, and it may be admitted, made them citizens of the United States, but it did not secure to them practical freedom. That was done by the Thirteenth Amendment, and because, under that amendment Congress may enact legislation acting primarily upon individuals, it may punish those who attempt by concerted action to deprive the negro of his right to contract solely for the reason that he is a negro. If a conspiracy should be entered into by blacks to hinder a white man, solely on account of his color, from making and enforcing contracts, Congress could legislate for such a case. That question

does not arise in this case, nor whether sections 1977 and 5508 would apply.

Appellants admit the case when they say (p. 13 of their brief):

> If individuals should undertake to enforce upon citizens of African descent, or upon any other persons, any form or badge of slavery, it can not be doubted that this would make a cause of action cognizable in the United States courts.

If a few individuals can combine to hinder the negro, because of his race, in the pursuit of employment, they can, by persistent, progressive acts, deprive him of every right the free enjoyment of which is necessary to keep him from returning again into practical bondage. Must he wait until he has been terrified into abstaining from exercising all his rights before he can call upon the nation? It is idle to say that the laws of Arkansas leave the courts open to him, for intimidation, like that alleged in this indictment, so effective that it causes the negro not only to abandon his contract, but to leave the place of its performance, utterly nullifies those laws.

Finally, appellants contend that if these sections be constitutional the indictment does not make a case within section 5508, because it is not alleged that the defendants therein named went in disguise.

It is not proposed to notice this contention further than to point out that section 5508 in its first clause, under which this indictment was drawn, does not require the allegation as to disguise, which applies only

to the offense defined in the second clause of the section. (See act of May 31, 1870, chapter 114, section 6, 16 Stats., 140, 141.)

One other point remains: It might be urged that the proposal of the Fourteenth Amendment shows that Congress had no power to enact section 1977 under the Thirteenth Amendment. A conclusive answer to this reasoning is that the same Congress which passed the act of 1866, within a month thereafter began the consideration of what is now the Fourteenth Amendment, and during nearly all the time that Senate bill No. 61, which became the act of 1866, was under consideration, was discussing various proposed amendments which involved ideas similar to those contained in the Fourteenth Amendment (see Cong. Globe, No. 70, p. 1033 et seq.).

As was said by Mr. Justice Gray in *Wong Kim Ark's case*, 169 U. S., 649, 675, referring to the civil-rights act of 1866, and the Congress which passed it:

> The same Congress shortly afterwards, evidently thinking it unwise and perhaps unsafe to leave so important a declaration of rights (that now contained in sections 1977 and 1978 of the Revised Statutes of the United States) to depend upon an ordinary act of legislation which might be repealed by any subsequent Congress, framed the Fourteenth Amendment of the Constitution, and on June 16, 1866, by joint resolution, proposed it to the legislatures of the several States. * * *

But the adoption of the Fourteenth Amendment could not take away from Congress its power to pass

legislation operating upon individuals. *Clyatt* v. *United States*, 197 U. S., 207.

Finally, it is respectfully suggested that if there be doubt whether the legislation of Congress, section 1977, be constitutional, the doubt should be resolved in favor of its validity according to the rule so well expressed by Mr. Justice Washington in *Ogden* v. *Saunders*, 12 Wheat., 213, where he said:

> If I could rest my opinion in favor of the constitutionality of the law * * * on no other ground than this doubt, so felt and acknowledged, that alone would, in my estimation, be a satisfactory vindication of it. It is but decent respect due to the * * * legislative body by which any law is passed to presume in favor of its validity until its violation of the Constitution is proved beyond all reasonable doubt.

Respectfully submitted.

MILTON D. PURDY,
The Assistant to the Attorney-General.

OTIS J. CARLTON,
Special Assistant to the Attorney-General.

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FILE COPY

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

REUBEN W. HODGES ET AL.
v.
THE UNITED STATES. } No. 14.

IN ERROR TO THE DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS.

ORAL ARGUMENT OF THE ATTORNEY-GENERAL FOR THE UNITED STATES.

MAY IT PLEASE YOUR HONORS:

At the October term, 1903, an indictment was returned in the District Court for the Eastern Division of the Eastern District of Arkansas. In the indictment it is alleged, by way of inducement, that certain persons therein named, being citizens of African descent, had entered into contracts for their services as laborers and workmen in the business of manufacturing lumber, with a copartnership which conducted that business; that in entering into these contracts they exercised a right and privilege conferred upon them by the thirteenth amendment to the Constitution of the United States; that the plaintiffs in error and certain other persons had entered into a conspiracy to deprive these colored citizens of the exercise of their right under the

Constitution to contract for their labor, by threats, intimidation, and force; that in the execution of that conspiracy they were driven from their work; and that this conspiracy was entered into and executed because these laborers were colored men and citizens of African descent.

It is inconceivable, your honors, that the conduct which is set out in this indictment would not be regarded as a crime in any community not made up of barbarians. I have no doubt whatever that it is a crime under the laws of the State of Arkansas. The question here is, whether it also is a crime against any law of the United States, constitutionally operative within the territory of the State of Arkansas.

The defendants interposed a demurrer. In which four reasons for demurrer were alleged. I need not read them. In substance the demurrer objects to the indictment because it does not state any crime against any law of the United States, which it was within the constitutional power of Congress to enact; but, on the other hand, sets forth an offense cognizable only by the courts of the State.

The demurrer was overruled in an elaborate written opinion, which appears in the record. (Rec. pp. 7–17.) The case was then tried to a jury. Certain of the defendants named in the indictment were acquitted and the plaintiffs in error were convicted. A petition for a writ of error was then filed, based upon the same objection which was contained in the demurrer, and one additional objection—that the verdict was against the

evidence. That additional objection may readily pass out of view, because there is no report of the evidence in the record and no question upon it raised otherwise than by the petition for a writ of error. The writ of error was duly granted, the case is here upon that writ, and raises the question raised by the demurrer—whether a crime against the United States or against any law of the United States constitutionally operative within the State of Arkansas is set forth in the indictment. The indictment is based upon section 5508 of the Revised Statutes, one of the surviving sections of the early civil-rights legislation. That section, or rather the material part of it, I will read to your honors:

> "If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same," * * * they shall be punished in the manner prescribed in the statute.

There is no other statute upon which this indictment could stand. The decision in the court below proceeded upon the theory that a crime against the provisions of this section had been set forth in the indictment.

That raises this precise question: Has a negro the right to contract for his own personal labor and in the execution of that contract the right to be exempt from concerted force and intimidation because of his race, secured by the Constitution of the United States and

protected by any law of the United States passed in pursuance of the power conferred upon Congress by the Constitution?

Mr. Justice BROWN. Does the statute cover cases of negroes, or more?

The ATTORNEY-GENERAL. The statute covers even more than that. The statute under which this indictment was found punishes a conspiracy to deprive any person of any right or privilege secured to him by the Constitution of the United States.

Mr. Justice BROWN. That would include white persons?

The ATTORNEY-GENERAL. It might if white persons have a racial right to be exempt from intimidation and force in the exercise of any right which is an essential part of freedom. The question here is, whether under this statute a negro, under the circumstances that I have stated, has the right to labor, and to be exempt from interference with that labor, secured to him by the Constitution of the United States.

Mr. Justice BREWER. Do you draw any distinction between the right of a negro to make a contract and the right of a white man?

The ATTORNEY-GENERAL. No, sir. I shall proceed upon a broader theory and a broader interpretation of the law. Section 5508 of the Revised Statutes, the penal section upon which this indictment must rest, punishes a conspiracy for the deprivation "of any right or privilege secured by the Constitution or laws of the United States." In order to bring the facts stated in

this indictment, and found by the jury to be true, within the purview of this penal statute, I must show that the right of these colored citizens of which they were deprived was a right secured by the Constitution or the laws of the United States.

Of course, it is immaterial whether the negro has any such right secured to him by the laws of the State of Arkansas. If he has not the right secured to him by the Constitution and laws of the United States, that is the end of this case, and the persons who were wronged in the manner set forth in this indictment have no other remedy than that which may be afforded them by the courts of the State of Arkansas.

It is very clear that no such right as that claimed in the case at bar was secured to the citizen by the original Constitution or by any of the earlier amendments to the Constitution. If the right exists at all, as a national right under the protection of the national power, it exists by virtue of something contained in the three war amendments. No such right exists by virtue of the fourteenth amendment to the Constitution, because that amendment, it seems now to be settled, in all its clauses, is prohibitive solely of State action; and laws constitutionally authorized under that amendment can only be corrective of the action of the State through its legislative, executive, or judicial department. It is equally obvious that no such right exists by virtue of the fifteenth amendment—first, because the fifteenth amendment deals with political rights only; and second, because it, like the fourteenth amendment, is prohibitive only of State action. If then the right

exists at all, it exists by virtue of the thirteenth amendment to the Constitution. Familiar as it is, I will read it:

> SECTION 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.
>
> SEC. 2. Congress shall have power to enforce this article by appropriate legislation.

Before considering the interpretation of that amendment and inquiring whether the right here before the court was conferred by it, let me dispose of two preliminary, though essential, questions in this case. Let me assume for a moment that such a right is conferred by the thirteenth amendment. If that be so, then Congress has the right to enact laws which operate directly and primarily upon the people—upon the individual—as distinguished from laws which only operate in correcting State action. This was precisely decided by this court, without dissent, in the recent case of *Clyatt* v. *United States* (197 U. S., 207), which was a case of peonage coming from the State of Alabama. It is important here, because the section of the Revised Statutes upon which this indictment is based is a law, not corrective of State action, but acting directly and primarily upon individuals.

Second, section 5508, upon which this indictment is based, is constitutional. That has been affirmed repeatedly by decisions of this court to which I will allude only briefly.

The right to vote at a Federal election (*Ex parte Yarborough*, 110 U. S., 651); the right to remain on a homestead entry for the purpose of perfecting the title (*United States* v. *Waddell*, 112 U. S., 76); the right of protection while in the custody, upon a charge of crime, of the officers of the United States (*Logan* v. *United States*, 144 U. S., 263), and the right to furnish information to the authorities of violations of the laws of the United States (*In re Quarles*, 158 U. S., 532; *Motes* v. *United States*, 178 U. S., 458) were each held to be rights belonging to the citizen derived from the Constitution and laws of the United States, or to use the words of the statute, secured by the Constitution or laws of the United States, the deprivation of which by a conspiracy was punishable by this section of the Revised Statutes.

It will be observed that Congress has yet directed no penal statute against individual action—the action of a single person depriving another of a right secured to him by the national Constitution. Congress has heretofore only dealt with the punishment of concerted action to that end. Of course, it would be within the power of Congress to deal with an individual offender if it chose to do so.

Having then determined that for the vindication of a right secured by the Constitution Congress may enact laws operating primarily and directly upon the individual, and that this section upon which this indictment is based is a constitutional exercise of the authority of Congress, the question then arises, Is the denial to a

negro of the right to labor, a denial based upon his race alone, a denial inspired by race hostility—the denial of a right secured to him by the thirteenth amendment to the Constitution? The position of the Government is this:

Where a man is forcibly denied, on account of his race or color, the right to earn his own bread by the sweat of his own brow, he is denied one of the essential rights of freedom, and to that extent is forced into a position of involuntary servitude.

Referring to your Honor's (Mr. Justice Brewer's) question of a few moments ago, an argument might be made distinguishing the African race in this regard from all other races. Much countenance for that distinction might be found. The distinction is based primarily upon the decision in the Dred Scott case where this court held that members of that race, whether slave or free, were not citizens of the United States, and were entitled only to such rights as the law might confer upon them. It might then be said, that the thirteenth amendment was an act of national naturalization; that the whole negro race obtained its right of citizenship as well as its right of freedom from that amendment, and that therefore that race, by that amendment, had been forever put in a place of peculiar safety, and its freedom and citizenship derived solely from the Constitution of the United States, and therefore entitled to its peculiar protection.

The utterances of statesmen and jurists, near the time the war amendments were passed, indicate that in

their minds the war amendments might be regarded as affecting the negro race alone. Mr. Justice Swayne, in the case of the *United States* v. *Rhodes* (1 Abbott, 28), speaking of this amendment, said: "The whites needed no relief or protection, and they are practically unaffected by the amendment." There never has been a time when there was not some qualification of that statement, a qualification which distinctly appears in the *Slaughter House cases* (16 Wallace, 36), in the utterances of Mr. Justice Miller, where he states that the pervading purpose of the three war amendments was the freedom, the citizenship, the equality of the negro race, but points out at great length that those amendments would also protect the rights of all other races.

At this day it is perfectly clear by the repeated decisions of this court that all three of those amendments are to be applied to all kinds and classes of our people. Notably the cases under the fourteenth amendment have carried that amendment beyond the mere protection of the African race. In two recent cases it has been shown very clearly that the view of this court is, that the benefits of the thirteenth amendment are not confined to the negro race.

In the case of *Robertson* v. *Baldwin* (165 U. S., 275), while the court divided upon the question whether the compulsory return of a sailor, under a statute enacted for that purpose, to serve out his contract of shipment, was a holding of him in the condition of involuntary servitude, no member thought that it was at all material to the case that the sailor, who was a party to the

cause, was a white man. In the *Clyatt case* (197 U. S., 207), although the persons actually held in a state of peonage were negroes, yet there is nothing in the opinion which indicates that anything turned upon that consideration, and the statute which was upheld punished the holding in peonage of any person, white, black, red, or brown. Moreover, the history of the origin of that statute shows very clearly that it was not directed to the enfranchisement of the negro race, but dealt with the freedom of the Indian and Mexican races. Therefore, for these reasons, I am not willing in my discussion to confine the benefits of this great charter of freedom to any one of the races that go to make up the American people.

It is true that the thirteenth amendment had a peculiar effect upon the African race. It was an act of national emancipation—it broke the bonds which held that race in slavery. But it was more than an act abolishing the institution of slavery. In the words of Mr. Justice Bradley, its reflex action established affirmatively in every person residing within the jurisdiction of the United States the right to be free. Before the thirteenth amendment was adopted, freedom was not secured to any of the people of the United States by the Constitution of the United States. The Constitution in all its parts contemplated a government by a free people. The Constitution in none of its parts undertook to determine what persons should constitute that people. On the other hand, the Constitution, while it did not confer freedom or protect the freedom

of any man, did not only contemplate slavery, but legalized it, and, for limited purposes, nationalized it, by that provision of the Constitution which says that any person,—not any black person,—held to service and labor under the laws of one State escaping into another State should not be free by the laws of that State, but might be taken by the authority of his master and returned to his service.

The freedom of the American citizens under the old Constitution was left within the control of the several States; and under the distribution of governmental powers made by the Constitution, the right to determine who should be slave and who should be free was left to the States. The right to protect the freedom of any individual was vested solely in the States. Slavery, in point of fact, came to be confined to the negro race. There is no reason, so far as the national Constitution is concerned, why it should not have extended to the yellow race, the brown race, or even the white race. Indeed, your Honors, it was brought to your attention in the Clyatt case, that ever since the acquisition of territory from Mexico in 1848, there had been slavery in the Territories of New Mexico and Arizona, and there was no constitutional provision prohibiting it. Still further, in our earlier history white men were either in slavery or in a condition which we should describe as involuntary servitude. Keeping clearly in view that under the distribution of governmental powers made by the original Constitution, the freedom of any man was not determined by the national

Constitution and could not be protected by the national law, but, on the other hand, was determined by the will of the people of the several States and protected only by the laws of those States, it is now my purpose to consider what effect upon that situation the thirteenth amendment to the Constitution had. It worked a profound change. It took the whole subject of freedom out of the custody and control of the several States and placed it in the keeping of the nation. It gave to the nation the same power to guard, protect and defend the freedom of all the people of the United States, as, for instance, it had to guard, protect and defend commerce among the States. In both cases the power is plenary. From the time of the thirteenth amendment any man who deprived another of his freedom as distinguished from his liberty became subject to the national power either in restraint or in punishment of his action.

Mr. Justice WHITE. Do you draw a distinction between freedom and liberty—you state freedom as distinguished from liberty?

The ATTORNEY-GENERAL. I will try to make it clear.

Mr. Justice WHITE. Would not "false imprisonment" be a violation of a man's freedom?

The ATTORNEY-GENERAL. "False imprisonment" is a violation of a man's liberty.

Mr. Justice WHITE. Why not "freedom?"

The ATTORNEY-GENERAL. Placing anyone in custody results in depriving him of his liberty, and the same thing directed against him because of his race——

Mr. Justice WHITE. You think it is not depriving him of his liberty unless it is on account of his race?

The ATTORNEY-GENERAL. Yes, sir.

Mr. Justice WHITE. If that be so, how does that comport with the proposition that the Thirteenth Amendment has taken control of the liberty or freedom of all the people of the United States, irrespective of race?

The ATTORNEY-GENERAL. If your honor will permit me I will argue that question by and by.

Mr. Justice BROWN. Does not liberty refer to a temporary deprivation of a man's action, and the word "freedom" to a permanent status?

The ATTORNEY-GENERAL. I think that is at least one distinction between the words.

The thirteenth amendment did not confer equality of rights; it did not confer the equal protection of the laws; it did not confer due process of law. So far as those subjects came to be of national concern, they received only the qualified protection which was bestowed upon them by the fourteenth amendment. The thirteenth amendment, moreover, did not confer political rights or equality of political rights. So far as those subjects came to be of national concern, they received only the qualified protection of the fifteenth amendment. It did not confer social privileges, which are not rights in any proper sense at all. Those were left to be regulated by the instincts, customs, preferences, and even prejudices of the people. The Constitution wisely put social privileges out of view. But

it affirmatively established freedom from slavery or involuntary servitude, and for the first time in our history as a nation it gave to Congress the right to protect that freedom from slavery and involuntary servitude by appropriate legislation.

What does it mean to be free? It means to be wholly free. A man has not, therefore, his full constitutional right unless he is wholly a free man—unless he is not in any sense in involuntary servitude. He has a right under this amendment not to be a slave or to be in servitude in any respect whatever. Congress has the power to pr him in that right. He need not wait until he has sunk in hopeless slavery. He need not see one right after another taken away from him, but may claim his freedom at the threshold and appeal to the power of the nation to protect him. Whenever in any respect he is denied the right of a free man his constitutional right is infringed and Congress may protect against the infringement. Thus has arisen the well-settled doctrine of this court that Congress may protect the people against what are sometimes called "badges," sometimes "incidents," sometimes "essential characteristics" of slavery or servitude. I think there is no doctrine better settled by this court than that the Congress has the authority to protect all the people of the United States against "badges" or "incidents" or "essential characteristics" of slavery or servitude, the language which Mr. Justice Bradley used, in announcing that doctrine in the Civil Rights Case, which has recently received the approval of the unanimous court.

Is, then, a denial of the right to labor on account of race an incident of slavery, a badge of slavery, an essential characteristic of slavery?

I answer, yes. I concede that if a man is denied the right to labor by the act of another directed against him on account of any personal hostility or ill will, or is denied the right to labor by the incidental or even necessary result of an ordinary crime—as false imprisonment—he is not denied a right under the Constitution of the United States. There must be something more. The motive for the denial must be something different than the personal hostility or ill will—than the mere motive which controls the offender in the commission of what Mr. Justice Bradley calls the "ordinary crime." It is not an unusual thing in the law for an act characterized by one intent, or inspired with one motive, to constitute one crime, or perhaps to constitute no crime, and the same visible external act inspired by another motive, characterized by another intent, to constitute an entirely different crime. The arrest of a person by any right-minded citizen because of his becoming suddenly insane, because he was a menace to himself, is perfectly legitimate. If you arrest him through personal hostility or ill will, it is false imprisonment. Breaking a window or door of a house in the night time and entering it for the purpose of extinguishing a fire, is innocent. Breaking through the same door or through the same window with the intent to commit larceny in the house, is burglary. There is no difference in the physical external features of the

act. The offense consists in the motive and intent with which it is done.

Mr. Justice BREWER. You think the concerted action of individuals denying the right of another to labor is putting him in a condition of slavery?

The ATTORNEY-GENERAL. Concerted action against another person, on account of his race, to deprive him of one of the essential rights of freedom, the right to labor, is a violation of the thirteenth amendment.

Mr. Justice BREWER. One of another race—against any person of another race—wouldn't the action of labor organizations in forbidding any person to labor unless he was a member of their organizations be depriving him of liberty?

The ATTORNEY-GENERAL. There might be different considerations. I prefer not to go beyond the necessity of this case.

Mr. Justice WHITE. Why not—what has the question of race to do with it? I hear the words of your distinction, but they do not make an impression upon me. Why does race enter into the question of involuntary servitude unless you confine the words "involuntary servitude" to the race to which freedom was given by the amendment? Take the case of an Irishman who strikes an Italian in working on the railroad. A body of Irish say, We do not like "Dagos" and will not work with them, and they drive them off; they wouldn't do it if they were Irish.

The ATTORNEY-GENERAL. Yes, sir.

Mr. Justice WHITE. The Irishman goes into a bar

room and he sees an Italian there and knocks him down. Would that be a violation under your theory?

The ATTORNEY-GENERAL. I wouldn't go that far.

Mr. Justice BROWN. Does not your position involve the overruling of the case of *United States* v. *Harris* (106 U. S., 629), in which section 5519 was held to be unconstitutional because it was broader than the thirteenth amendment?

The ATTORNEY-GENERAL. The case of the *United States* v. *Harris* was this: A man was arrested for a violation of a State law and was in custody of the State officers. By concerted action he was taken out of their custody and violence inflicted upon him. The question there was whether a constitutional law had been passed which would allow the punishment of people who had denied to another the equal protection, not of the law of the nation, but the equal protection of the law of the State. There were some illustrations used by the justice who delivered the opinion that went beyond the necessity of that case.

Mr. Justice BROWN. That was the thirteenth amendment?

The ATTORNEY-GENERAL. That case was based upon section 5519 of the Revised Statutes, which punishes a conspiracy to deprive any person of the equal protection of the laws of the State. To the claim that the section was authorized by the fourteenth amendment, the court replied that it could not be, for the reason that it was not corrective of State action but operated directly and primarily upon individuals. To

the claim that the section was authorized by the thirteenth amendment, the court replied that the statute was broader than the thirteenth amendment, and for these two reasons the court held the statute unconstitutional. The statute in this case is clearly constitutional, and the only question is, whether the case is brought within the terms of the statute.

Mr. Justice BREWER. The language of the thirteenth amendment is slavery or involuntary servitude.

The ATTORNEY-GENERAL. Yes, sir.

Mr. Justice BREWER. Now, is it not an essential element of slavery that there should be a master to whom the involuntary service is rendered directly?

The ATTORNEY-GENERAL. Slavery, and perhaps involuntary servitude, includes the idea of a master or masters to whom the person in slavery or involuntary servitude is compelled to render obedience. But I am relying here upon the well-settled doctrine, stated clearly in the Civil Rights Cases to which I shall hereafter refer, in language which, in part, was quoted and approved in the recent Clyatt case, that "badges," or "incidents," or "essential characteristics" of slavery or involuntary servitude are forbidden by the Thirteenth Amendment equally with slavery or involuntary servitude themselves

Mr. Justice WHITE. I see that in view of the great disaster at San Francisco the white people having a prejudice against the Chinese race are declining to sell property to Chinamen because they are Chinamen, with the hope that they will be driven out of San Francisco.

Is not the right to buy property the right of a free man?

The ATTORNEY-GENERAL. The right to buy property from a person who is willing to sell property is a right guaranteed by the thirteenth amendment, but the right to buy property from an owner of property who does not wish to sell it is not in any proper sense a right at all.

Mr. Justice DAY. This amendment everybody supposed was intended to protect the colored race. Other races were never thought of at all.

The ATTORNEY-GENERAL. I can easily rest this case upon the fact that the persons injured were of the colored race, and therefore peculiarly within the protection of the thirteenth amendment. But I have not been able to satisfy my mind that this amendment makes a permanent distinction between negroes and persons of other races. Its benefits extend to all persons of all races.

Mr. Justice DAY. The indictment charges that the offense was committed because they were colored.

The ATTORNEY-GENERAL. I can find no lodgment in my mind for the thought that a mob which deprives a negro of the right to labor because of his race has violated this amendment, while another mob which deprives an Italian of the right to labor on account of his race has not.

Mr. Justice DAY. That case is not here.

The ATTORNEY-GENERAL. No.

Mr. Justice DAY. This charge is that it was done because they were of the African race.

THE ATTORNEY-GENERAL. Section 5508, upon which this indictment is based, is a statute which punishes the deprivation of any right secured by the Constitution or laws of the United States, and the court has held that statute constitutional. The question is whether the right in question here was a right guaranteed by the Constitution of the United States.

Mr. Justice DAY. Assuming that, under that amendment which declared all negroes free, there is a power inherent to protect that freedom by protecting the right to work as an incident—then you come to the statute, the right and privilege secured by the Constitution of the United States. Now, is it your proposition that is secured without further legislation?

The ATTORNEY-GENERAL. I think that is perfectly clear under the decisions, if it is a constitutional right.

Mr. Justice DAY. Section 5510 imposes a penalty upon every person who, under the color of any State law, deprives another of a right, privilege, or immunity secured or protected by the Constitution and laws of the United States. Do you claim that a person can be punished under this section unless he acts under the color of the law of the State of Arkansas; or do you claim that there is any law of Arkansas authorizing such conduct?

The ATTORNEY-GENERAL. No, sir; I do not claim either.

Mr. Justice DAY. This section makes it a criminal offense for a person to deprive another of a constitutional right only in case the deprivation is under color

of the State law. Do you make the distinction between the action of a single offender and the concerted action of several offenders? I ask the question so as to clear my own mind on the subject.

The ATTORNEY-GENERAL. I think I understand your Honor's question, and I proceed to answer it as the answer lies in my mind. If a right is secured to any person by the Constitution of the United States, the Congress has power to punish any person or persons who may deprive him of that constitutional right. The Congress clearly has the power to do that, whether the deprivation is under color of State law or not. The Congress, however, has not chosen to exercise its full power for reasons which are easily understood. The Congress by section 5508 makes punishable concerted action of individuals to deprive another of a constitutional right; but by section 5510 a single individual is punishable for such a deprivation of a constitutional right only when the act of deprivation is done under color of a State law. Concerted action is always more dangerous than the solitary action of one individual, and Congress might well make a distinction between the two cases, as it has done.

Mr. Justice DAY. Is there anything in section 5508 which is specifically directed to this particular right in question here?

The ATTORNEY-GENERAL. No, sir; there is not. This section punishes a conspiracy to deprive another of any right secured by the Constitution and laws of the United States. It has been repeatedly held that this

section is constitutional, and it has been held as well that the deprivation of a constitutional right may be punished under it, even though the right may not be specifically set forth in any provision of the law or of the Constitution. The case of *Logan* v. *United States* (144 U. S., 263) was a case of this kind. There it was held that a person while in the custody of the officers of the United States under a charge of crime had a right secured by the Constitution and laws of the United States to protection from violence. That right of protection was not conferred specifically by any provision of the Constitution or of the laws, but grew out of the nature of the Government and its power to arrest offenders and hold them in custody for trial. In that case the concerted action by which the prisoner was taken from his lawful custody and violence inflicted upon him was held to be punishable under this section of the statutes, because he had been deprived of a right secured by the Constitution and laws of the United States, although it was not specifically secured by any specific section of either.

Again, in *Ex parte Yarbrough* (110 U. S., 651), the court held that the right to vote at a Federal election was not conferred upon any person by any particular section of the Constitution or of the statutes. It is a right that grows out of the nature of our free government. Who shall vote, or who shall not vote, is determined by the action of the States. The State having once determined who shall vote and who shall not vote, a man once having become a voter by the

determination of the State has a right to vote secured by the Constitution and laws of the United States, although there is not a specific part of the Constitution or a specific section of the laws which confers that right. And the court held that where people by concerted action and force deprived a person of that right, it was a violation of this very section of the statutes, because the right which was there in question was a right secured to him by the Constitution and laws of the United States.

Mr. Justice DAY. The contention is that when a combination of men deprives another of a right secured by the Constitution, they may be punished under this section, although a single offender may not.

The ATTORNEY-GENERAL. My contention, of course, would be that the same authority which Congress has to punish the concerted action to deprive another of his right secured by the Constitution, it has, but as yet has not exercised, to punish an individual who deprives another of a right secured to him by the Constitution. And because Congress has punished only concerted action, it does not follow that Congress thinks it has the right to punish only concerted action. It has simply punished concerted action and left unpunished the action of the individual unless it is under color of a State law.

Let me illustrate from the Logan case: There the court, as I have said, held that persons who entered into a conspiracy to take the prisoner from the custody of the officers of the United States and inflict violence

upon him were punishable under this statue. But if a single individual should, alone and unaided, do the same thing—although he would equally violate a right secured by the Constitution and the laws of the United States—there is no Federal statute which would reach him. Congress might enact such a statute, but it has not done so. In the case of the individual, his misconduct could only be punished in the State courts because the laws of the United States impose no penalty upon him.

For instance, suppose we have one man in Massachusetts under arrest by the marshal and another man in Ohio under the same arrest. If in Ohio a single man takes away the prisoner from the custody of the marshal and lynches him, no statute of the United States has yet been enacted by which that man can be punished; he must be left to his punishment by the laws of Ohio. If, in the other case, in Massachusetts, two or more men do precisely the same thing, they are punishable, according to the decision of *Logan* v. *The United States*, under this section. I say there is no law which punishes the individual action of one person in depriving another of a right secured by the Constitution or laws of the United States. I say, in the second place, that a right may be secured to the citizen by the Constitution and laws of the United States although there can be found not a single line in either specifically defining the right.

Mr. Justice Day. Your argument is that section 5508 has not gone farther than concerted action?

The ATTORNEY-GENERAL. Yes, sir.

I have contended that there is a valid distinction between the denial to a person of the right to labor by forcible action, which is inspired by motives of personal hostility or ill will, or which results incidentally or necessarily from the commission of an ordinary crime, and the same denial of the right to labor which is inspired by race hostility.

Now, it seems to me that the Government's case rests on that distinction. If it can be maintained at all, it must be maintained by that distinction. I would not for a moment contend that the thirteenth amendment ever gave the nation power to step over into the territory of the States and deal with all the ordinary crimes which may be committed. It has only the power to step over into the territory of a State and deal with a crime which is a crime against freedom, which was authoritatively established by the thirteenth amendment, and for the protection of which authority was affirmatively given to Congress to enact appropriate legislation.

Now, there is little authority upon this proposition, but what authority there is seems to sustain my contention. In the first place we have the contemporaneous interpretation of the thirteenth amendment. The thirteenth amendment was adopted on December 18, 1865, and less than thirty days thereafter Mr. Trumbull, chairman of the Judiciary Committee, introduced Senate bill 61, which afterwards came to be, over the

veto of President Johnson, the first civil rights law. The first section was this:

> That all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding.

That is a declaration not made hastily, but after great deliberation, and after meeting the resistance of a Presidential veto; it was the view of those who had framed the thirteenth amendment that that amendment gave them authority to enact, that every person within the United States should have the right to enforce contracts, to sue and give evidence, to inherit, control, lease, sell, convey, and hold personal property. And the debate in Congress, to which some reference is made in the brief (Brief pp. 11–14), shows very clearly that that law was enacted and that declara-

tion was made because the people who adopted the thirteenth amendment thought that that amendment gave Congress the power to enact that law and make that declaration. It is the contemporaneous interpretation of the thirteenth amendment by the very men who adopted it in Congress.

The next authority to which I invite your honors' attention is the *Cruikshank case* (1 Wood, 308) in the circuit court.

Mr. Justice DAY. Judge Bradley speaks out rather more freely then than he did in the case I have stated.

The ATTORNEY-GENERAL. Yes; he speaks very freely in the Cruikshank case. As I recall it, Mr. Justice Bradley did not deliver the opinion in this court.

Mr. Justice DAY. No; the case came here and the chief justice delivered the opinion—Chief Justice Waite.

The ATTORNEY-GENERAL. I do not claim that anything was decided in the Cruikshank case which is relevant to the case at bar. That was a case charging a number of people with a conspiracy to deprive certain citizens of African descent of the rights that were enumerated in the various counts of the indictment. For one reason or another the Circuit Court held all of those counts bad, and that holding was affirmed when the case reached this court. I refer to the Cruikshank case in the Circuit Court because Mr. Justice Bradley thought it appropriate in that case to discuss the effect of the thirteenth amendment. His words are a deliverance of one of the most learned justices who ever

occupied a seat upon this bench. They partake of the authority which comes from the contemporaneous expounder of the Constitution as well. And relying upon the illustrious character of that justice, relying upon the great part he played in settling the interpretation of the war amendments, relying upon the fact that he was of the generation which adopted those amendments, I feel justified in inviting your honors' attention to some of his utterances in that opinion. Mr. Justice Bradley, on page 319, said:

> It can not be doubted, therefore, that Congress had the power to make it a penal offense to conspire to deprive a person of, or to hinder him in, the exercise and enjoyment of the rights and privileges conferred by the thirteenth amendment and the laws thus passed in pursuance thereof.
>
> But this power does not authorize Congress to pass laws for the punishment of ordinary crimes and offenses against persons of the colored race or any other race. That belongs to the State government alone. All ordinary murders, robberies, assaults, thefts, and offenses whatsoever are cognizable only in the State courts, unless, indeed, the State should deny to the class of persons referred to the equal protection of the laws. Then, of course, Congress could provide remedies for their security and protection. But in ordinary cases where the laws of the State are not obnoxious to the provisions of the amendment, the duty of Congress in the creation and punishment of offenses is limited to those offenses which aim

at the deprivation of the colored citizen's enjoyment and exercise of his rights of citizenship and of equal protection of the laws because of his race, color, or previous condition of servitude.

To illustrate: If in a community or neighborhood composed principally of whites, a citizen of African descent, or of the Indian race, not within the exception of the amendment, should propose to lease and cultivate a farm, and a combination should be formed to expel him and prevent him from the accomplishment of his purpose on account of his race or color, it can not be doubted that this would be a case within the power of Congress to remedy and redress. It would be a case of interference with that person's exercise of his equal rights as a citizen because of his race. But if that person should be injured in his person or property by any wrongdoer for the mere felonious or wrongful purpose of malice, revenge, hatred, or gain, without any design to interfere with his rights of citizenship or equality before the laws, as being a person of a different race and color from the white race, it would be an ordinary crime, punishable by the State laws only.

To constitute an offense, therefore, of which Congress and the courts of the United States have a right to take cognizance under this amendment, there must be a design to injure a person, or deprive him of his equal right of enjoying the protection of the laws, by reason of his race, color, or previous condition of servitude. Otherwise it is a case exclusively within the jurisdiction of the State and its courts.

Justice Bradley there makes the clear distinction between the crime which is inspired by the ordinary motives of malice and ill-will, and the crime which is inspired by racial hatred. The former case, he says, lies with the State courts, and the latter case, he says, lies with the courts of the United States. If that utterance of that distinguished jurist is a correct interpretation of the law and a correct interpretation of the Constitution, then the Government's case here is maintained.

Mr. Justice HOLMES. I quite agree if that language be adopted; it is all right as far as section 5508 goes, but your second proposition, as I understood it, is that section 1977 was a valid exercise of its power by Congress to confer rights under the thirteenth amendment.

The ATTORNEY-GENERAL. I did not cite section 1977 as the law under which this prosecution was based. I only cited it as a contemporaneous interpretation by the men who framed the amendment, of that which they thought they had the power to do.

Mr. Justice HOLMES. I have not yet got it quite through my mind whether you are ultimately coming to the proposition that this indictment stands on section 1977 and must stand on it, and that section 1977 can be maintained. Very likely I have failed to appreciate the full scope of what you were saying. I want to be sure I am following you.

The ATTORNEY-GENERAL. If the case can stand at all, it stands solely upon section 5508 and the Constitution. And let me repeat the argument I have made

This statute, which is constitutional, makes it a penal offense for two or more persons by concerted action to deprive another of any right or privilege secured to him by the Constitution or laws of the United States. It is the Government's contention that the right to work, notwithstanding one's race, is a right secured to every person in our jurisdiction by the Constitution of the United States, and that where, by concerted action, another is deprived on account of his race or, if you please, on account of the fact that he belongs to a race which was once in slavery, of the right to work, which is one of the rights essential to freedom, that concerted action may be punished under section 5508 of the Revised Statutes.

I would ask your honors' indulgence while I read another paragraph from Mr. Justice Bradley's opinion in the Cruikshank case (p. 325):

> The *war of race*, whether it assumes the dimensions of civil strife or domestic violence, whether carried on in a guerrilla or predatory form, or by private combination, or even by private outrage or intimidation, is subject to the jurisdiction of the Government of the United States.

I ask your honors to consider those words from that great judge. "The war of race" is his language. And he continues:

> And when any atrocity is committed which may be assigned to this cause, it may be punished by the laws and in the courts of the United States; but any outrages, atrocities, or conspir-

> acies, whether against the colored race or the white race, which do not flow from this cause, but spring from the ordinary felonious or criminal intent which prompts to such unlawful acts, are not within the jurisdiction of the United States, but within the sole jurisdiction of the States, unless, indeed, the State, by its laws, denies to any particular race equality of rights, in which case the Government of the United States may furnish remedy and redress to the fullest extent and in the most direct manner. Unless this distinction be made, we are driven to one of two extremes—either that Congress can never interfere where the State laws are unobjectionable, however remiss the State authorities may be in executing them, and however much a proscribed race may be oppressed; or that Congress may pass an entire body of municipal law for the protection of person and property within the States, to operate concurrently with the State laws, for the protection and benefit of a particular class of the community. This fundamental principle, I think, applies to both the thirteenth and fifteenth amendments.

Now, it is perfectly clear that Justice Bradley did not, in that language, intend to confine the benefits of the thirteenth amendment to any particular race. It is the *war of races* of which he speaks. And when in the execution of that war of races, whether by the State or by concerted action of individuals, or by private outrage, a man is denied one of the essential rights of freedom on account of his race as a consequence of the war of races—in the opinion of Mr.

Justice Bradley, the offense is within the cognizance of the Federal courts.

Mr. Justice HOLMES. I don't see why you might not pursue your general line of thought and yet not make it so broad. You might say wherever a race hostility against the negro arises or threatens involuntary servitude, that under those circumstances it is within the protection of the laws to which you are referring, and yet a racial hostility or an overt act of a precisely similar character against other races might exist and under those circumstances might not be within them.

The ATTORNEY-GENERAL. It is much the easier argument, but I can not make it because I do not believe——

Mr. Justice HOLMES. I don't see why it is not entirely possible to admit that there might be a race war which would not carry with it a threat of servitude.

The ATTORNEY-GENERAL. There might be a race war which had nothing to do with the essential rights of a free man. It is so much easier for us to understand what a race war means when it is directed against the negro race than it is when it is directed against any other race that one might naturally be led to suppose that there can be no deprivation of the rights of freedom of another race except the negro race.

Let me borrow the illustration of the Indian race of Mr. Justice Bradley. They were in that condition of slavery known as peonage, and were, of course, freed from that condition by the thirteenth amendment. Suppose the white people of the Territories in which peonage existed had declared a war of race against

them; had said to them, "You shall not work; you are an Indian or you are a Mexican; you shall not work on account of your race; you shall not work because you were once a peon;" would there be any distinction between such action directed against the Indian or Mexican and the same action directed against the negro? I submit there is no distinction between the cases.

I submit that Mr. Justice Bradley was right in saying that the Indian could be protected by Congress against an attack upon his freedom. Let me go a step further and illustrate by the racial hostility against the Chinese: They could not be protected under this section of the Revised Statutes because they are not citizens. But they have a constitutional right to be free and to enjoy all the essential elements of freedom. Suppose it should be determined that the Chinese should not have the right to work—determined by a mob raising the war of race against the Chinese that they should not work—not because of dislike to that particular Chinaman or the other particular Chinaman, but that the Chinaman should not work on account of his race. Is not his freedom attacked? He is entitled to the benefit of the thirteenth amendment which protects all persons. When the mob says to them, "You shall not have one of the most essential rights of a free man, the right to work," is it not within the power of the National Government to restrain that or to punish those who attempt to deprive that race of that right?

The other cases are the Civil Rights cases. The

precise question at bar was not before the court in the cases known as the Civil Rights cases. But the course of reasoning in those cases, which received the assent of all the judges, leads, it seems to me, to a conclusion sustaining the Government's position in this case. I therefore ask your honors' attention to the case stated somewhat in detail.

These were four indictments, and one action in which it appeared that various persons of color were denied the privilege of inns, theaters, and a ladies' railroad car, in violation of an act of Congress which expressly forbade the denial of such privileges on account of color. The various denials were not under color of any State statutes. The majority of the court held that this law—the law which forbade the denial of equal privileges in theaters, inns, and railroad cars—was not, in the first place, authorized by the fourteenth amendment, because under that amendment Congress had only power to pass laws corrective of State action; and this law was not of such a character. This part of the case is not important here.

The court was unanimous that mere social privileges were not within the view of the Constitution or of any amendment thereof. The court, I think, was unanimous in the view that any imposition upon any person which was a badge, or incident, or essential characteristic of slavery or involuntary servitude was forbidden by the thirteenth amendment, and that any laws operating directly and primarily upon the people, designed to protect them from such badges, or incidents, or

essential characteristics of slavery or involuntary servitude are, by virtue of the thirteenth amendment, within the constitutional power of Congress.

There was a difference of opinion in the court in that case whether the acts which the defendants had committed were badges or incidents or essential characteristics of slavery or involuntary servitude, the majority of the court holding they were not. The dissenting justice thought on account of the peculiar functions exercised by those who managed inns and theaters and railroad trains that these acts were badges and incidents and essential characteristics of slavery. That difference of opinion is not material here.

But there was no difference of opinion on the principle that Congress, by a law operating directly upon the people, might forbid, under penalty, any of the essential characteristics of slavery.

Your honor (Mr. Justice Brewer) asked me a short time ago why slavery or involuntary servitude did not include within its meaning the authority of a master. It does. But a man is not wholly free upon whom is imposed any of the badges or incidents or essential characteristics of slavery. He has a right to resist his enslavement at the very threshold, and he finds his authority for that right in the decision of every member of this court in the Civil Rights cases, because they all held that Congress had a right to pass laws which shall forbid, under penalty, not only the holding of a person in slavery and involuntary servitude, but the imposition upon him of any of the incidents, characteristics and badges of slavery.

We have in that case a clear definition of what the majority of the court understood to be essential characteristics of slavery—badges and incidents of slavery—and they are contained in the opinion of Mr. Justice Bradley, from which I will read one paragraph (*Civil Rights cases*, 109 U. S., 3, 22):

> The long existence of African slavery in this country gave us very distinct notions of what it was and what were its necessary incidents. Compulsory service of the slave for the benefit of the master, restraint of his movements except by the master's will, disability to hold property, to make contracts, to have a standing in court, to be a witness against a white person, and such like burdens and incapacities, were the inseparable incidents of the institution. Severer punishments for crimes were imposed on the slave than on free persons guilty of the same offenses. Congress, as we have seen, by the Civil Rights Bill of 1866, passed in view of the thirteenth amendment before the fourteenth was adopted, undertook to wipe out these burdens and disabilities, the necessary incidents of slavery, constituting its substance and visible form, and to secure to all citizens of every race and color and without regard to previous servitude those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell, and convey property, as is enjoyed by white citizens.

Speaking of a part of the Civil Rights Act, he says:

> Whether this legislation was fully authorized by the thirteenth amendment alone, without the support which it afterwards received from the fourteenth amendment, after the adoption of which it was reenacted with some additions, it is not necessary to inquire. It is referred to for the purpose of showing that at that time (in 1866) Congress did not assume, under the authority given by the thirteenth amendment, to adjust what may be called the social rights of men and races in the community; but only to declare and vindicate those fundamental rights which appertain to the essence of citizenship, and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery.

And then he goes on to say later:

> Under the thirteenth amendment, the legislation, so far as necessary or proper to eradicate all forms and incidents of slavery and involuntary servitude, may be direct and primary, operating upon the acts of individuals, whether sanctioned by State legislation or not; under the fourteenth, as we have already shown, it must necessarily be, and can only be, corrective in its character, addressed to counteract and afford relief against State regulations or proceedings.

That language has received the approval of a unanimous court in the Clyatt case.

In the dissenting opinion, a careful statement of the effect of the opinion of the court is made. I will read from it (p. 35):

> They admit, as I have said, that the thirteenth amendment established freedom; that there are burdens and disabilities, the necessary incidents of slavery, which constitute its substance and visible form; that Congress, by the act of 1866, passed in view of the thirteenth amendment, before the fourteenth was adopted, undertook to remove certain burdens and disabilities, the necessary incidents of slavery, and to secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell, and convey property as is enjoyed by white citizens.

Now, if that statement by the dissenting justice is a correct statement of the majority opinion, and I submit that it is, the majority opinion not only sustains the case at bar, but it is sustained upon the broad ground which I took, that there inheres in and belongs to every man of every race everywhere within the jurisdiction of the United States all of the essential rights and privileges of a free man and that the National Government has the right by direct legislation to protect him in the enjoyment of his freedom.

This case was originally submitted upon briefs by the parties. In response to your honors' direction, I

am here to submit my views. Exigencies of the public welfare have little place in a court of justice in the interpretation of the laws and the Constitution. And yet they have some place. They admonish us to search well all the sources of national power.

It is not legally important that in this or any other State the remedy under the State laws is useless, if that be true. That consideration can not control the interpretation of the law and the interpretation of the Constitution. The war of races is no longer a sectional war; it is as bitter in the State of Chase and Giddings as it is in the State of Arkansas. It is the war of races. If the negro who is in our midst can be denied the right to work and must live on the outskirts of civilization, he will become more dangerous than the wild beasts, because he has a higher intelligence than the most intelligent beast. He will become an outcast lurking about the borders and living by depredation.

There is but one refuge from that condition, and that is to put himself back under some chosen master in the condition of slavery itself. If the nation has not the power at the very threshold to say to those who declare against this or other races, that as a race it shall not have one of the most essential rights of a free man, it is powerless indeed. I submit that it has that power. It was given to the nation by the thirteeth amendment, and this case is brought within it.